

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of the Application of Kansas    )  
City Power & Light Company Regarding       )  
the Sale of Assets and Property Rights        )

**Case No. EO-2010-0353**

**STAFF RECOMMENDATION TO DENY KCPL’S APPLICATION, OR, IN THE ALTERNATIVE,  
TO APPROVE – WITH INDICATED CONDITIONS - THE SALE OF SPECIFIED ASSETS AND  
PROPERTY RIGHTS AS SET OUT IN THE DRAFT AGREEMENT FILED JUNE 23, 2010,  
AND STAFF RECOMMENDATION TO DENY KCPL’S REQUEST FOR WAIVER**

COMES NOW the Staff (“Staff”) of the Missouri Public Service Commission (“Commission”) and pursuant to the Commission’s *Order Regarding Application*, issued June 17, 2010, and corrected by its June 21, 2010, *Order Correcting Order Nunc Pro Tunc* (collectively, “*Order*”) submits its recommendation to deny Kansas City Power & Light Company’s (“KCPL”) *Application*, filed June 23, 2010, or in the alternative to approve with conditions, and Staff recommendation to deny KCPL’s *Request for Waiver*, filed July 9, 2010, as follows:

**Procedural History**

1. On May 28, 2010, KCPL filed its *Application and Motion for Expedited Treatment*, (“first application”) requesting that the Commission decline to exercise jurisdiction under Section 393.190.1, RSMo (2000) with regard to the sale of 32 wind turbine generators and the associated property rights in Ford County, Kansas, and grant other such relief as may be warranted.

2. Following the filing of a Staff response, an on-the-record discussion, and discussion at multiple Commission Agenda sessions, the Commission denied KCPL’s first application, and ordered (1) KCPL to file an application seeking authorization from the Commission to transfer the 32 wind turbine generators and related property rights regarding a proposed additional wind farm near Spearville, Kansas, on terms identified in an attached draft

agreement, and (2) its Staff to submit its recommendation regarding that application no later than July 13, 2010.

### **Relief Requested in KCPL's June 23, 2010, Application**

3. In its June 23, 2010, application, ("second application") KCPL requested that the Commission (1) approve, on as timely a basis as possible, the sale of the specified 32 wind turbine generators and the property rights in Ford County, Kansas, on terms generally identified in attached draft agreements,<sup>1</sup> and (2) grant other such relief as may be warranted, or in the alternative, (3) decline to assert jurisdiction over the proposed transaction, as originally requested in the Company's first application.

4. The assets are as follows:

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<sup>2</sup> "WTG" refers to "Wind Turbine Generator."

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6. It is unclear whether, by its second application, KCPL seeks preapproval of either the draft agreements or the Purchased Power Agreement (PPA).

### **Extent of Commission Jurisdiction**

7. As a threshold issue, Staff will not re-address the alternative relief requested in KCPL's second application, that the Commission decline jurisdiction "over the proposed transaction, as requested in the Company's Application and Motion For Expedited Treatment filed on May 28, 2010."

Section 393.190.1, RSMo (2000) provides, in pertinent part, as follows:

No... ..electrical corporation... ..shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public... ..without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void....

8. KCPL's entry into a PPA does not appear to require Commission authorization under § 393.190.1. In that the Commission does not have to authorize under § 393.190.1 KCPL's entry into a PPA, absent the terms of a PPA including the sale, assignment, lease, transfer, mortgage, or other disposal or encumbrance of assets, the Commission should be clear in its order in this matter that it is not inadvertently preapproving any PPA should it authorize the sale of the 32 specified wind turbines.

9. Similarly, § 393.190.1 only requires a finding by the Commission that a given sale, assignment, lease, transfer, mortgage, or other disposal or encumbrance of assets is not detrimental to the public interest. The Commission does not have to specifically approve the terms of the sale, etc., and the Commission should be clear in its order in this matter that it not inadvertently preapprove the specific drafts that have been provided with KCPL's second application.

10. If the Commission is going to make a determination regarding KCPL's request that the Commission authorize KCPL's proposed disposition of the 32 wind turbines and property rights in Ford County, Kansas, then the Commission cannot wait till a rate case before it makes any determination whether the proposed disposition is not detrimental to the public interest.

The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger. The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium.

*State ex rel. AG Processing, Inc. v. Public Service Comm'n*, 120 S.W.3d 732, 736 (Mo.banc 2003).

### **Standard**

11. Determinations under § 393.190 are subject to the “not detrimental to the public interest,” standard, as stated in *State ex rel. City of St. Louis v. Public Serv. Comm'n*, 73 S.W.2d 393, 400 (Mo.banc 1934); *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n* 120 S.W.3d

732, 735 (Mo. 2003). Thus, the question before the Commission is whether the sale of the specified 32 wind turbine generators and the property rights in Ford County, Kansas, on terms identified in an attached draft agreement, is actually detrimental to the public interest.

### **Staff's Recommendations**

#### **Deny Application**

12. As discussed in the attached Staff Memorandum, Appendix A,<sup>3</sup> Staff recommends the Commission deny KCPL's second application to sell the specified assets.

13. Staff's analysis indicates that sale of the specified assets on the terms described in the draft agreements is detrimental to the public interest.

#### **Alternative Recommendation to Approve Sale of Specified Assets on Specified Terms with Indicated Conditions**

14. As discussed in the attached Staff Memorandum, Staff provides the alternative recommendation that the Commission (1) grant KCPL the authority to sell the specified assets, on the terms contained in the draft agreements described in footnote 1, subject to the conditions described below, and (2) not preapprove the draft agreements described in footnote 1.

15. Staff's analysis indicates that sale of the specified assets on the terms described in the draft agreements is detrimental to the public interest; however, this detriment may be mitigated by application of certain conditions, described below.

16. It is unclear whether, by its second application, KCPL seeks preapproval of the draft agreements. Even if the Commission has authority to preapprove the draft agreement, Staff does not recommend approval, or preapproval, of the specific agreements that were included with KCPL's second application.

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<sup>3</sup> Staff is filing its Memorandum as Highly Confidential in its entirety, and asks that KCPL identify those portions of it that are truly Highly Confidential as soon as is practicable.

### Recommended Conditions

- 1) KCPL is required to hold its Missouri customers harmless for its decision not to build Spearville 2 as owned generating facilities incurring more costs as a PPA.
- 2) KCPL is required to impute the difference of the least costs resulting from ownership of wind turbines compared to the higher costs relating to the purchased power agreement, in the amount of at least \*\*  

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- 3) KCPL is required to certify and provide clear evidence that in its costs to purchase the wind energy under the PPA and the cost \*\*  

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\*\* its ratepayers will receive the benefit of the full amount of any and all available federal, state and local tax credits, federal, state and local tax grants for wind energy, and any and all other wind energy rebates and credits in an amount equal to or greater than the amount KCPL would have realized had it purchased, constructed and placed the assets in commercial operation.

### Request for Waiver

17. In its July 9, 2010 *Request for Waiver*, KCPL requests as follows:

...a waiver of 4 CSR 240-3.110(1)(B) and (3) which require the applicant to provide a copy of the contract or agreement of sale to the Commission before it makes its decision. Under 4 CSR 240-2.015, the Commission can waive a rule for good cause. As explained in this pleading, good cause exists because Staff has sufficient information to make a recommendation. In addition, the potential buyer will not proceed with negotiating the transaction until the uncertainty regarding Commission approval is resolved.

18. Staff generally has sufficient information to make a recommendation regarding sale of the specified assets under the terms of the draft agreements that it received on June 23, 10, attached to KCPL's second application. While KCPL has not provided a draft of the  
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\*\* in the interest of expeditiously preparing this recommendation, Staff has attempted to estimate the terms of this document through information

that KCPL has provided. Staff has made every endeavor to (1) analyze the draft agreements included with the second application, and (2) to acquire and analyze the additional information necessary to analyze those draft agreements. KCPL has, generally, responded to data requests and informal requests for information related to this matter very promptly, however, all requested information has not yet been made available, nor as Staff had an opportunity, as of this time, to thoroughly review or analyze it. Staff necessarily has not performed an analysis of final agreements. Those final agreements may materially differ from the draft agreements.

19. Good cause cannot exist for the Commission to authorize the sale, assignment, lease, transfer, mortgage, or other disposal or encumbrance of “the whole or any part of [the utility’s] franchise, works or system, necessary or useful in the performance of its duties to the public” absent a determination that the transaction is not detrimental to the public interest. *See City of St. Louis*, 73 S.W.2d at 400; *AG Processing*, at 735.<sup>4</sup> If the Commission does not examine the ultimate terms of the transaction, the Commission cannot have fulfilled its statutory obligation to determine that the transaction is not detrimental to the public interest.

20. Staff is not interested in needlessly performing a full-blown analysis of any final agreements. If the terms of final agreements are materially similar to that of the draft agreements, Staff anticipates that its review would be little more than to corroborate a representation by KCPL that the terms are materially similar. However, if the final agreements differ to an extent that additional analysis is necessary, Staff cautions the Commission against accepting KCPL’s invitation to waive the Commission’s statutory obligation to review the transaction actually being consummated.

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<sup>4</sup> **4 CSR 240-3.210** (1) In addition to the requirements of 4 CSR 240-2.060(1), applications for authority to sell, assign, lease or transfer assets shall include: (D) The reasons the proposed sale of the assets is not detrimental to the public interest[.]

**WHEREFORE**, Staff (1) submits its recommendation regarding Kansas City Power & Light Company's second application, filed June 23, 2010, (2) recommends the Commission deny KCPL's request to approve the sale of the specified assets and property rights, or, (3) in the alternative, approve, subject to the indicated conditions, KCPL's sale of the specified assets and property rights, and (4) recommends the Commission deny KCPL's *Request for Waiver*, filed July 9, 2010.

Respectfully submitted,

/s/ Sarah Kliethermes

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#### **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 14<sup>th</sup> day of July, 2010.

/s/ Sarah Kliethermes